Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SPYRIDON ARMENIS,
Petitioner,
v.
ALBERT CRAMER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro se

QUESTIONS PRESENTED

The following questions are presented by the Petitioner:

1. Did the Eleventh Circuit Court of Appeals properly apply summary judgment standards in this action?

2. Should this Court reconsider or clarify its decisions in *Matsushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986); *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986)?

PARTIES BELOW

Petitioner Spyridon Armenis was the plaintiff-appellant in the court below. Respondent Albert Cramer was defendant-appellee in the court below.

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---

PETITION FOR A WRIT OF CERTIORARI

Spyridon Armenis, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, filed on January 20, 1998, denying petitioner a jury trial and a good-faith determination of the *facts* in this case.

OPINIONS BELOW

The Court of Appeals' unreported opinion is reproduced on pages 1a-2a of the Appendix to this certiorari petition (hereafter "Pet. App."). The unreported District Court Order is reproduced at Pet. App. 12a-27a. The Magistrate's Report and Recommendation is reproduced at Pet. App. 3a-11a.

JURISDICTIONAL STATEMENT

The Court of Appeals opinion was entered on January 20, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Seventh Amendment to the United States Constitution and Federal Rule of Civil Procedure 56.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56 provides:

> (a) For Claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a

genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

Petitioner is a pro se litigant who attempted to take the issues of breach of contract, breach of fiduciary duty, and interference with business relationships in a real estate development project to a jury under the diversity jurisdiction statute, 28 U.S.C. § 1332.

The original complaint was filed on June 6, 1994. The gist of the complaint is that:

A. Respondent Cramer breached a written contract by, among other actions, using a veiled purchaser for part of the properties involved in the dispute.

B. Respondent Cramer violated that trust relationship by entering into secret negotiations with third parties

C. Respondent Cramer filed a spurious legal action with the intention of interfering with Petitioner Armenis' other development projects and to defame Petitioner Armenis.

On June 20, 1995, master docket entry no. 68, Magistrate Judge Donald P. Dietrich, in his Report and Recommendation, recommended that Respondent Cramer's motion to strike punitive damage claims be granted, recommended that the motion to dismiss be granted without prejudice as to Count II, and that otherwise the motion should be denied.

On September 11, 1995, master docket entry no. 71, federal district court judge Anne C. Conway approved/disapproved in part the Magistrate's Report and Recommendation and gave the Petitioner until September 25, 1995 to amend his complaint, which was amended by Petitioner and submitted on September 25, 1995, master docket entry no. 73.

On April 25, 1996, master docket entry no. 81, Respondent Cramer filed a motion for final summary judgment.

On April 25, 1996, master docket entry no. 84, Respondent Cramer filed his affidavit.

On August 8, 1996, master docket entry no. 109, Judge Conway set jury trial for March 2, 1998.

On November 18, 1996, master docket entry no. 112,

Judge Conway granted Respondent's motion for summary judgment. This motion was apparently based on such principles of law as:

1. The judge (not the jury) decides what constitutes a genuine issue of fact. (See Order, II. Summary Judgment Standard, Pet. App. 13a.)

2. "[T]he Court accepts as undisputed the facts as stated by [Respondent] Cramer, except as *modified* by the *Court* herein." (See Order, Pet. App. 14a note 2) (emphasis added).

3. The "Court herein" then modified the facts in that the land to be purchased was substituted with "another parcel" when in fact it was the *same land*. (See Order, Pet. App. 16a, paragraph 4.)

4. Other untruthful statements are found in the Order, to wit:

A. ". . . as had been agreed." (See Order, Pet. App. 18a, paragraph 1.)

B. "Cramer never implemented 'Armenis' time-share concept'. . ." (See Order, Pet. App. 18a, paragraph 2.)

5. The Court noted " . . . that Florida law concerning, the duration of fiduciary duties appears unsettled." (See Order, Pet. App. 24a note 8.)

6. The Court appears to have conducted trial by affidavit. (See Order, Pet. App. 25a, last paragraph.)

The Eleventh Circuit Court of Appeals then affirmed the district court's Order in a one-page, three paragraph opinion that looks suspiciously like a summary prepared by staff attorneys, in which the lower court decision was simply condensed and parroted. One of the two cases cited by the appellate court, *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 612-13 (11th Cir. 1995), does state that:

> We review the district court's grant of summary judgment *de novo*, applying the *same* legal standards used by the district court.

What was not addressed is whether those legal standards were *wrong*.

On November 27, 1996, master docket entry no. 115 and 116, Petitioner Armenis attempted to bring the fraud in this action to the attention of the district court.

On December 18, 1996, master docket entry no. 130, Petitioner Armenis moved to recuse Judge Conway and to reconsider her rulings.

On January 9, 1997, master docket entry no. 133, Petitioner's motions were denied.

Petitioner then timely appealed on January 27, 1997, master docket entry no. 134.

REASONS FOR GRANTING THE WRIT

The Writ must be granted because the Eleventh Circuit's decision represents an unprecedented encroachment on Petitioner's constitutional right to a jury trial. The summary judgment ruling in the district court relied on spurious affidavits, an issue ignored by the Eleventh Circuit Court of Appeals.

This Court should also reconsider or clarify its decisions on its 1986 trilogy of summary judgment cases, *Mastushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986), *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), which as the dissenters in those cases pointed out, were bound to sew confusion in the lower courts.

As an example of this confusion, compare the opinions in

Celotex Corp. v. Catrett, supra, (an asbestos case) with *In re Joint Eastern & Southern Dist. Asbestos Lit.*, 52 F.3d 1124 (2nd Cir. 1995)(an asbestos case), which relied on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) for the summary judgment principle to be applied.

The Second Circuit appears to have ignored this Court's holdings in its 1986 trilogy, though the facts (if not the legal principles discussed) in *Celotex Corp. v. Catrett*, supra, and *In re Joint Eastern & Southern Dist. Asbestos Lit.*, supra, are almost mirror images of each other.

"A crucial mission of the [Supreme] Court is to *implement* the Constitution successfully." Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harvard L.Rev. 56, 57 (1997) (emphasis in original).

I. THE ELEVENTH CIRCUIT COURT OF APPEALS DID NOT PROPERLY APPLY SUMMARY JUDGMENT STANDARDS IN THIS ACTION.

The suggestion of rehearing en banc, Pet. App. 28a-36a, prepared with the assistance of Professor Judith Resnik (Yale Law School), amply illustrates [some of] the problems arising from the appellate panel's ruling in this action, see Pet. App. 29a.

What could not possibly have been known to Professor Resnik at the time is that Eleventh Circuit appellate panels *routinely* do *not read* pro se appellate briefs. The practice in the Eleventh Circuit is as follows:

The Eleventh Circuit has twelve (12) appellate judges and forty-seven (47) staff attorneys. Pro se briefs are read by the staff attorneys who then *summarize* their contents, said *summary* then being read by the appellate judges who make the decision. This information did not become public until

March 23, 1998 at a public hearing in Atlanta, Georgia by the Commission on Structural Alternatives for the Federal Courts of Appeals with the Honorable Byron White, presiding. Petitioner is in the process of attempting to obtain transcripts of this hearing.

I.e., apparently the Eleventh Circuit Court of Appeals, like the English Court of Common Pleas in the fourteenth century, has decided that it "doesn't have time for the affairs of peasants." Plucknett, *Concise History of the Common Law*, p. 310 (1956).

The summary judgment standards applied in this action were deficient in the following areas as well:

A. Summary judgment may be given, under Rule 56, *only* if there is no dispute as to *any* material fact. *Fountain v. Filson*, 69 S.Ct. 754, 756 (1949). For the principles that *should* have been applied in the Eleventh Circuit Court of Appeals, compare *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1478 (11th Cir. 1990)("sufficient advance notice") with the en banc petition of Professor Resnik.

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.Rules Civ.Proc., 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . .
>
> *Poller v. Columbia Broadcasting System*, 82 S.Ct. 486, 488 (1962) (citation omitted).

B. Petitioner Spyridon Armenis, on more than one occasion, attempted to bring to the attention of the lower court that the main affidavits submitted by the Respondent are *spurious*.

The problems created by spurious affidavits are simply insurmountable when a district court judge relies on those affidavits to make her ruling. See Anthony D'Amato, *The Ultimate Injustice: When the Court Misstates the Facts*, 11 Cardozo Law Review 1313 (1989).

When relying upon a spurious affidavit in a summary judgment motion the court must, not may, misstate the facts. This is the exact opposite of what is supposed to happen. An affidavit made in bad faith is a contempt of court, Federal Rule of Civil Procedure 56(g), not a reason for entering summary judgment.

II. THE TRILOGY OF DECISIONS IN 1986 ON SUMMARY JUDGMENT HAVE SOWN SEEDS OF CONFUSION IN THE LOWER COURTS AND NEED TO BE RECONSIDERED OR CLARIFIED.

There are two (2) views concerning unwise decisions issued by the United States Supreme Court.

The first view is that the members of the United States Supreme Court recognize the errors of their predecessors and take steps to correct them.

> In any case, I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face. With some reservation concerning decisions that have become so embedded in our system of government that return is no longer possible (a

> description that surely does not apply to *Booth*), I agree with Justice Douglas: "A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736 (1949). Or as the Court itself has said: "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions." *Smith v. Allwright*, 321 U.S. 649, 665, 64 S.Ct. 757, 765, 88 L.Ed. 987 (1944).
>
> *South Carolina v. Gathers*, 109 S.Ct. 2207, 2218 (1989)(Justice Scalia dissenting).

The other viewpoint is that of some of the Supreme Court's harshest critics, comparing Supreme Court justices to "high priests" and comparing perpetuating error to religious orthodoxy:

> It is one of the essential weaknesses of the Government by Judiciary that, as in all theocratic governments, based upon the sole power to expound a sacred text, its priests cannot afford to admit error without undermining the power of the priesthood and upsetting the form of government in which they are the ruling caste. Error must therefore be perpetuated, no matter what the consequences. For to those who believe in that form of government, that form of government is of much more

> importance than the alleged sacred text upon the exposition of which it is supposed to be based.
>
> Louis B. Boudin, *Government by Judiciary*, Vol. II, pages 287-288 (1932).

In recent years, as the relatively quick correction of *Grady v. Corbin*, 110 S. Ct. 2084 (1990) by *United States v. Dixon*, 113 S.Ct. 2849 (1993) proves, the latter viewpoint has, apparently, been discredited.

This viewpoint is further reinforced in Segal and Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 American Journal of Political Science 971 (1996) (Results: Overwhelmingly, Supreme Court justices are not influenced by landmark precedent with which they disagree. We replicate the research for nonlandmark decisions and find similar results).

In recent years the holdings in *Mastushita Elec. Indus. Co. v. Zenith Radio*, 106 S.Ct. 1348 (1986), *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986) have allowed the lower courts almost unbridled discretion in the denial of jury trial to American citizens and foreign nationals alike.

Matsushito, supra, was instrumental in practically destroying an American industry as well. Entries from various newspaper indexes under "Zenith Electronics Corp." illustrate part of what *Matsushita* failed to correct.

> . . . GE's decision [to abandon production of color televisions in US] leaves Zenith the last major American manufacturer of televisions (L), Jl 24,IV,4:3
>
> *New York Times Index 1987*, p. 1393

> . . . shipped nearly 1,500 jobs to Mexico in 1992 . . . says another 300 workers will lose their jobs in next year. . . plant in Springfield, Mo, which once had 4,000 workers, will be left with only about 50 employees (S), Ja 29,I,37:1
>
> *New York Times Index 1994*, p. 1278
>
> Despite a growing economy, year-end layoffs come thick and fast at some companies. . . . and troubled television maker Zenith Electronics Corp plans 1,200 cuts. (S) D 24 - A, 1:5
>
> *The Wall Street Journal Index - Corporate News 1996*, p. 1097
>
> . . . company has reported loss every year but one since 1985 (S), S 6,I,40:2.
>
> *New York Times Quarterly Index, Jul-Sep 1997*, p. 413

Celotex Corp., supra, may have been diluted by this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), as illustrated by the decision in *In re Joint Eastern and Southern Dist. Asbestos Lit.*, 52 F.3d 1124 (2nd Cir. 1995).

To view the errors in the foregoing trilogy of cases it is first necessary to review and summarize the dissents in those three cases:

> The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary

> judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.
>
> *Matsushita*, supra, at 1362 (Justice White dissenting).

> The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 2514. In my view, the Court's analysis is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment.
>
> *Anderson*, supra at 2515 (Justice Brennan, dissenting)(footnote omitted).

Ironically, this is the *same* Justice Brennan who *authored* *New York Times v. Sullivan*, 84 S.Ct. 710 (1964) that the majority *relied on* in *Anderson*.

> The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case. The Court refers to this as a "substantive standard," but I

thin' it is actually a procedural requirement engrafted ont. Rule 56, contrary to our statement in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), that

> "[w]e have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *Id.*, at 790-791, 104 S.Ct., at 1487-1488.

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

Anderson, supra, at 2520-2521 (Justice Rehnquist dissenting).

The Court clearly rejects the ruling of the Court of Appeals that the defendant must provide affirmative evidence disproving the plaintiff's case. Beyond this, however, the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion.

Celotex Corp., supra, at 2556 (Justice Brennan dissenting)(footnote omitted).

Which is *exactly* what has happened in legions of lower court cases.

> In light of the District Court's plain error, therefore, it is perfectly clear that, even after this Court's abstract exercise in Rule construction, we should nonetheless affirm the reversal of summary judgment on that narrow ground.
>
> *Celotex Corp.*, supra, at 2561 (Justice Stevens dissenting)(footnote omitted).

For a treatment of the above trilogy of Supreme Court decisions as equally harsh as the quoted dissents, supra, see Issacharoff and Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale Law Journal 73 (1990) and McFadden, *Trial by Summary Judgment? Erosion of the Seventh Amendment*, Trial p. 64 (July 1996). McFadden pointed out that "The analytical quagmire Justice William Brennan predicted in his dissent . . . has been realized." *Id.* at 66.

Other courts have made equally uncomplimentary observations concerning summary judgment and the issues it raises.

> The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, § 2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial

> erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.
>
> *Galloway v. United States*, 63 S.Ct. 1077, 1090 (1943)(Justice Black dissenting)(footnote omitted).

How that guarantee has since been dishonored over a period of two centuries is ably discussed on pages 1091-1096, *id.*

> [T]he court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.
>
> *Slocum v. New York L. Ins. Co.*, 33 S.Ct. 523, 532 (1912).

This is what was done in the present case.

See also *Capital Traction Co. v. Hof*, 19 S.Ct. 580 (1899); *Baylis v. Travelers' Ins. Co.*, 5 S.Ct. 494 (1885); *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 183 (3rd Cir. 1992).

A district court judge penned his observations of summary judgment four years before the *Matsushita* trilogy was decided:

> Summary judgment is an extreme and treacherous remedy, not to be entered unless movant has established its right to judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any set of discernible circumstances. Summary judgment is notoriously inappropriate for the determination of claims in which

issues of intent, good faith and other subjective feelings play dominant roles.

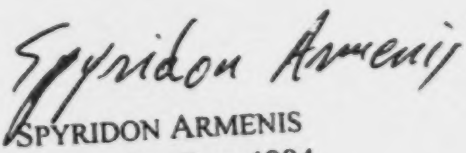
Croxen v. U.S. Chemical Corp. of Wisconsin, 558 F.Supp. 6, 7 (N.D. Iowa W.D. 1982)(citations omitted).

Courts grasp at thin air when they search for reasons why *stare decisis* must be an intrinsic good. Worse, they disserve justice; they bind themselves and the future to the missteps and wrong turns of an imperfect part. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 Yale Law Journal 2031 (1996).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: April 7, 1998

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2111
Non-Argument Calendar

D.C. Docket No. 94-624-CIV-ORL-22

SPIRO ARMENIS
Plaintiff-Appellant,

PASCALL GROUP, INC., a corporation,
Plaintiff.

versus

ALBERT CRAMER,
Defendant-Appellee

WARSTEINER BRAUEREI HAUS CRAMER GMBH & CO. KG, a German limited Partnership, et al.,
Defendants.

Appeal from the United States District Court
for the Middle District of Florida

Decided and Filed January 20, 1998.

Before: BIRCH, DUBINA and HULL, Circuit Judges.
PER CURIAM:

The issue presented in this appeal is whether the district court erred in entering summary judgment in favor of appellee Albert Cramer ("Cramer") and against appellant Spyridon Armenis ("Armenis") on Armenis' claims for breach of contract, tortious interference with business relationship, and breach of fiduciary duty.

This court reviews the district court's grant of a motion for summary judgment *de novo*, applying the same legal standards used by the district court. *Parks v. City of Warner Robbins, Ga.*, 43 F.3d 609, 612-13 (11th Cir. 1995). "Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The court reviewing the motion must consider the evidence in the light most favorable to the nonmoving party." *Jaques v. Kendrick*, 43 F.3d 628, 630 (11th Cir. 1995).

After reviewing the record in this case, we conclude that Armenis received proper summary judgment notification and the district court did not err in finding that: (1) Cramer and Armenis never entered a joint venture agreement; (2) there was no breach of the agreement and therefore no fiduciary duty; (3) filing a state court complaint does not constitute tortious interference with business relations; and (4) the district court correctly denied Armenis' Rule 59(e) motions. Moreover, we conclude that the remaining arguments presented by Armenis in this appeal were either not presented in the district court or are meritless. Accordingly, we affirm the district court's grant of summary judgment in favor of Cramer and against Armenis.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 94-624-Civ-Orl-22

SPIRO ARMENIS, etc., et al.,
Plaintiffs.

vs.

ALBERT CRAMER, et al.,
Defendants.

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Submitted June 20, 1995

TO THE UNITED STATES DISTRICT COURT:

This cause is before this Court pursuant to Order of Reference dated November 21, 1994 [Document #44]. In accordance therewith this Court was directed to make report and recommendation on the Defendants' Motion to Dismiss and Motion to Strike, filed September 26, 1994 [Document #20]. The Plaintiffs filed their Brief in Opposition to the Defendants' Motion on October 11, 1994 [Document #33]. A conference was held on this Motion on February 2, 1995 [Document #50]. At this conference the Plaintiffs requested

additional time to conduct jurisdictional discovery so as to file evidence in support of their opposition to the Defendants' Motion to Dismiss. The Court granted the requested relief [Document #51]. In addition, the Court allowed the Defendants to file a Reply to the Plaintiffs' opposition [Documents #51, 52]. Subsequently, the Plaintiffs requested an additional extension to conduct jurisdictional discovery and submit evidence [Document #53]. The Court again granted the requested relief, allowing the Plaintiffs until April 14, 1995 [Document #54]. No evidentiary submissions have been made.[1] Accordingly, the Defendants' Motion is at issue, and for the reasons set forth hereafter it is respectfully recommended that the Motion to Dismiss be granted in part and denied in part and the Motion to Strike be granted.

ALLEGATIONS

The Plaintiffs Spiro Armenis (Armenis) and Pascall Group, Inc. (Pascall) brought suit against the Defendants on June 6, 1994, for breach of contract, breach of fiduciary duty, and interference with business relationships regarding real estate development in Florida.[2] The Plaintiffs allege that the breach of contract occurred on or about June 15, 1989. As to the fiduciary duty and business relationships claims the Plaintiffs allege that the Defendants misconduct occurred up through June 7, 1990. Defendant, Albert Cramer, is a German citizen. No dispute as to personal jurisdiction exists as to this Defendant. Defendant Warsteiner Brauerei Haus

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1 The Plaintiffs have had the period from December 20, 1994, through April 14, 1995, within which to conduct such discovery and submit evidence [Documents #49, 51, 54]. This is clearly an adequate period.

2 There is a state court action by Cramer against Armenis and others alleging misappropriation of funds advanced on this real estate venture.

Cramer GmbH & Co. KG, (Warsteiner), is a German corporation which brews beer. Haus Cramer GmbH (Haus Cramer), is a German corporation and is a partner of Defendant Warsteiner. Haus Cramer Hotelbeteiligungs-Und Verwaltungs GmbH (HCHV),[3] is also a German corporation. Collectively, these are the business Defendants.

The business Defendants have moved to dismiss the action as it relates to them on the basis of lack of personal jurisdiction. The business Defendants have filed affidavits contesting the Plaintiffs' jurisdictional allegations [Documents #20, exhibits A-C].[4] The affiants therein deny that they do business in Florida, maintain offices or bank accounts in Florida, or own or control real estate in Florida. Defendant Warsteiner also denies being engaged in the importation or sale of beer in Florida.

In response to the Defendants' motion and affidavits the Plaintiffs have filed affidavits [Documents #30-32]. By these affidavits Cramer is alleged to have entered into a joint venture agreement with the Plaintiffs, Armenis and Pascall, to develop real property in Florida. These business Defendants are alleged to own operate and control real property in Florida, have bank accounts and maintain offices, and are alleged also to have engaged in the aforementioned joint venture through corporate "fronts" of Aquarina Developments, Inc., and Transnation Holdings, Inc. In addition, it is

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3 This company was previously known as Haus Cramer Management GmbH.

4 These affidavits were filed by Rolf Dietrich, a director of Haus Cramer, Peter Sommer, a director of HCHV, and Joachim Bongard, the Chief Administrator and CFO of Warsteiner. These affidavits deny various allegations contained in the Complaint of the Plaintiffs. These affidavits, however, provide little information to the Court as to the functions and relationships of the business Defendants amongst themselves and with Defendant Cramer.

alleged that Warsteiner has imported beer into Florida.

ISSUES AND ANALYSIS

Jurisdiction

This Court may exercise jurisdiction over non-resident Defendants to the extent permitted by the Florida long-arm statute, Florida Statute section 48.193. *Jet Charter Service, Inc. v. Koech*, 907 F.2d 1110, 1112 (11th Cir. 1990). This statute provides that a non-resident can be subjected to personal jurisdiction through performing certain enumerated acts[5] for actions arising out of the doing of said act, or through engaging in substantial and not isolated activities within the state, whether or not the claim arises from that activity.

In terms of due process, there are two types of personal jurisdiction, general and specific. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408 (1984). General jurisdiction arises as a result of the Defendant's contacts with the forum state that are unrelated to the litigation. The test for general jurisdiction is whether the defendant had "continuous and systematic" general business contacts within the state. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Specific jurisdiction is based on the Defendant's contacts in the forum state and the litigation arises out of or relates to these activities. The test for specific jurisdiction is in two parts: 1) were the Defendant's contacts with the forum state so substantial that it could reasonably be expected to be haled into court there; 2) would the exercise of jurisdiction by the forum state offend the traditional notions of "fair play and

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5 Most relevant herein are subsections (1)(b) committing a tort and (1)(g) breaching a contract.

substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

When a Defendant raises by affidavit or documents a meritorious challenge to personal jurisdiction, the burden shifts to the Plaintiff to prove jurisdiction by affidavits, testimony or documents. *Jet Charter Service, Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990). Jurisdictional facts alleged in the complaint must be accepted as true unless controverted by the Defendant's affidavits, and where the jurisdictional affidavits and other evidence are in conflict all reasonable inferences must be construed in favor of the Plaintiff. *Cable/Home Communication v. Network Productions*, 902 F.2d 829, 855 (11th Cir. 1990).

As mentioned heretofore, the evidence of record contains the affidavits of the corporate Defendants denying their involvement in the failed real estate development which lead to this action or their having any substantial contacts with the state of Florida.

In response, the Plaintiffs have filed affidavits which refer to the Florida corporations directly involved in the joint venture as being "fronts" for the Defendants. There is no record evidence supporting this allegation and, thus, this court disregards same. The Plaintiffs' evidence does, however, contain a number of letters signed by Cramer or Dr. Horst Liebich[6] negotiating the terms of the joint venture, written on HCH stationery. Further, the first draft of the joint venture agreement reflects HCH as being a joint venturer.

There is also substantial evidence that Warsteiner's beer is sold in Florida. However, the evidence of record reflects that Warsteiner is imported into the state through Warsteiner Importers Agency. Though Armenis asserts that this agency

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6 Dr. Liebich, according to the Plaintiffs' affidavits, was the CFO of Warsteiner from 1987 to 1992 as well as the CFO of Haus Cramer.

is not a separate legal entity, as appears on its letterhead, the affiant alleged to have determined same, Grossmann, made no such representation in his affidavit. The record also reflects a $300,000 letter of credit from Warsteiner to Florida National Bank on behalf of EGYB, Inc.[7] The record reflects that these funds were to be used for this joint venture.

As to Haus Cramer it appears to have performed no acts in Florida. However, it is the general partner of Warsteiner, Cramer is its president and Liebich is its CFO. Both Cramer and Liebich actively negotiated with the Plaintiffs regarding the joint venture in Florida.

In that the record is in dispute, this Court is required to make all reasonable inferences in favor of the Plaintiffs. Accordingly, this Court finds that it is reasonable to infer that HCH was a party to the negotiation of the joint venture agreement. It is also reasonable to infer that Warsteiner was the Defendants source of financing for the proposed real estate ventures. Further, there is no reason to believe that Warsteiner was not acting on behalf of its general partner, Haus Cramer.

Given these inferences, it appears that HCH and Warsteiner have engaged in acts within the state from which the causes of action in this case have arisen. Further, Haus Cramer, as a general partner, may be subjected to the jurisdiction of this court as a result of the action of its partner. *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 658 F.Supp. 572, 575 (M.D.Fla. 1993); *Kelly v. State Dept. of Insurance*, 597 So.2d 900, 901 (Fla. 3d DCA 1992). Further, and again in light of these inferences, the Defendants should reasonably have anticipated being hauled into court in Florida by becoming involved in a real estate joint venture in this state. Nor

7 EGYB, Inc., is not a party to this action, but is a Defendant in the State action by Cramer for recovery of funds advanced, apparently this particular $300,000.

are traditional notions of fair play offended by the exercise of such jurisdiction.

Thus this Court recommends that the Motion to Dismiss on jurisdictional grounds be denied.

Failure to State a Claim

The Defendants have also moved to dismiss the Plaintiffs' action on the basis that the Plaintiffs' claims for breach of contract, breach of fiduciary duty, and defamation are barred by the statute of limitations as asserted by the Defendants in their affirmative defenses. As a general rule, an affirmative defense will not support a rule 12(b)(6) motion to dismiss unless the complaint's allegations clearly indicate on its face the existence of such defense. *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993).

Regarding the breach of contract claim, the Defendants argue that such claim is barred by the Florida four year statute of limitations on oral contracts. *Fla. Stat.* 95.11(3)(k) (1993). The Plaintiffs have responded by asserting that their contract claim is founded on a written instrument and, thus, their claim was timely filed within the five year limitations period. *Fla. Stat.* 95.11(2)(b) (1993). The complaint does not allege whether the contract was oral or written. Thus, the application of the asserted affirmative defense does not appear on the face of the complaint and, as such, the Motion must be denied on this point.

As to the breach of fiduciary duty claim, the second count of the complaint, the business Defendants assert that the allegations referring to them occurred outside the applicable four year statute of limitations. *Fla. Stat.* 95.11(3)(p) (1993). The Plaintiffs have responded by referring to events which were not pleaded but which transpired within four years of the filing the complaint. Thus, it appears appropriate to

dismiss this count with leave granted the Plaintiffs to replead.

The third count of the complaint alleges tortious interference with the Plaintiffs' business relationships[8] with respect to projects other than those encompassed by the alleged joint venture agreement. Accordingly, the Florida legal principle that a Defendant cannot be sued for tortious interference in a business relationship in which that Defendant[9] is a party is inapplicable.

As to the Defendants' Motion to Strike Plaintiffs' claims for punitive damages same should be granted. There is presently no adequate evidentiary record to support such claim. Accordingly, it may not be pleaded at this time. 768.72 *Fla. Stat.* (1993).

The remaining claims relating to the sufficiency of the complaint and real parties in interest are more properly addressed by motion for summary judgment. Thus, they should be denied.

Accordingly, it is respectfully recommended that the Defendants' Motion to Dismiss be Granted without prejudice as to Count II, with leave granted the Plaintiffs to replead within twenty (20) days. The Motion to Dismiss should be otherwise denied. As to the Defendants' Motion to Strike it is recommended that same be granted without prejudice, and the Plaintiffs' claims for punitive damages be stricken.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days of the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

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8 The Defendants discussion regarding malicious prosecution and defamation is inapplicable. Though count 3 is certainly no model of clarity in pleading, it does not appear to this court to plead such causes of action.

9 *Ethyl Corporation v. Balter*, 386 So.2d 1220, 1224 (Fla. 3rd. DCA 1980).

Respectfully submitted at Orlando, Florida, this 20th day of June, 1995.

/s/ D.P. Dietrich
D. P. DIETRICH
United States Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 94-624-CIV-ORL-22

SPIRO ARMENIS, and PASCALL GROUP, INC.,
Plaintiffs,

vs.

ALBERT CRAMER,
Defendant.

ORDER

Submitted and Filed November 18, 1996

I. INTRODUCTION

Spiro Armenis and Pascall Group, Inc. have sued Albert Cramer.[1] The Amended Complaint (Dkt. 73) alleges three

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1 The initial Complaint (Dkt. 1) also named as defendants Warsteiner Brauerei Haus Cramer GMBH & Co. KG, a German limited partnership; Haus Cramer GMBH, a German corporation; and Haus Cramer Hotelbeteiligungs-Und Verwaltungs GMBH, also a German corporation. These defendants were dismissed for lack of personal jurisdiction on September 11, 1995. *See* Dkt. 71.

claims: breach of a joint venture agreement, breach of fiduciary duties, and tortious interference with business relationships. Cramer seeks summary judgment on all of these claims. Upon considering the parties' summary judgment submissions, the Court determines that Cramer is entitled to summary judgment on each of the Plaintiffs' claims.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Next, the "non-moving party...bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324.

III. FACTS[2]

Cramer is a German citizen and a resident of Warstein, Germany. He and Transnation Properties, Inc. ("Transnation") are the owners (20% and 80%, respectively) of the shares of Aquarina Development, Inc., a Florida corporation which owns a condominium development in Brevard County, Florida, known as "Aquarina." Cramer owns 100% of the shares of Transnation. Ex. 1, Cramer Aff., ¶ ¶ 2 and 3.[3]

In late 1987, Armenis, through an intermediary, approached Cramer to discuss the possibility of their companies entering into a joint venture agreement to further develop Aquarina by building, developing and selling a time share and hotel resort there and on several adjacent properties known as the Scogna property,[4] the Orange Grove property, and an unnamed 80-acre tract. Ex. 2, Liebich Aff., ¶ ¶ 6 and 7. In a letter dated March 3, 1988, Armenis formally proposed that his and Cramer's companies enter into a joint venture for the purpose of developing this property. In his March 3rd letter, Armenis described the purpose of the contemplated joint venture:

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2 This statement of facts is based primarily on the "Statement of Material Facts Not in Dispute" set forth in Cramer's Motion for Summary Judgment. Dkt. 81 at 2-8. In some instances, Cramer's statements of fact are repeated verbatim herein. Cramer has supported his statements of fact with affidavits and other documents attached to his motion for summary judgment. Although Plaintiffs maintain that the material facts are in dispute, they have not identified specific evidence controverting Cramer's fact statements. Accordingly, the Court accepts as undisputed the facts stated by Cramer, except as modified by the Court herein.

3 All citations to exhibits in this statement of facts refer to exhibits attached to Cramer's Motion for Final Summary Judgment (Dkt. 81).

4 The Scogna property was also known as the "Scognia" property and the "Hammock" property.

> to create a major destination resort containing, among other things, a golf course, a major hotel franchise, one or more time-share projects, various classes of residential properties, a marina and a tennis complex.

Ex. 6, ¶ 5. Armenis offered specific terms for the joint venture. Ex. 2, ¶ 8; Ex. 6. Cramer (through his assistant, Dr. Horst Liebich) responded to Armenis' proposal by expressing interest in a letter in a letter dated March 16, 1988, but countering with different terms. Ex. 2, ¶ 9; Ex. 7. Armenis responded with his own counteroffer in a letter dated March 20, 1988. Ex. 2, ¶ 10; Ex. 8.

Cramer did not respond in writing to that counteroffer. Ex. 1, ¶ 11. By letter of March 30, 1988, Armenis then proposed to Cramer that they enter into an "Interim Joint Venture" to at least buy the additional nearby properties (Scogna, Orange Grove and the unnamed 80 acres) which they contemplated developing, and in the meantime finish negotiating with the goal of a written "Final Joint Venture Agreement." Ex. 1, ¶ 12; Ex. 2, ¶ 12; Ex. 9. In his March 30th letter, Armenis wrote to Cramer:

> Pursuant to discussion of March 30, 1988, your letter of March 16, 1988 and our reply of March 20, 1988, the following shall serve as our "Interim Joint Venture" to be supplemented by a "Final Joint Venture Agreement" *to be completed and executed within 60 days.*

Ex. 9 (emphasis supplied). Armenis further proposed that they each put up $300,000 as deposit monies to buy those additional properties. Ex. 1, ¶ 12; Ex. 2, ¶ 12; Ex. 9.

The March 30th letter from Armenis contained a section for Cramer's acceptance. Cramer did not sign Armenis' letter. Instead, Cramer and Liebich responded with a letter to

Armenis dated March 31, 1988. Ex. 1, ¶ 13; Ex. 2, ¶ 13; Ex. 10. The letter stated:

> We refer to your letter dated 3/30/88 which we fully agree to.
>
> As discussed in Orlando we would like to repeat our following additional agreement:
>
> If the proposed Aquarina Joint Venture does not become effective then Albert Cramer shall have the right to opt FFMC[5] out at cost, and have the land transferred to himself or one of his companies. If the option is not executed the partnership shall continue.

Ex. 10.

By letter dated April 4, 1988 (Ex. 11), Armenis changed the proposed properties to be purchased by substituting another parcel, the "Next to the 80 Acre Property" (also known as the Treetop property) for the unnamed 80 acres referred to in the March 30, 1988 letter and Cramer's March 31, 1988 letter. Additionally, Armenis proposed that if the "joint venture does not take place", Cramer should be allowed to buy the Orange Grove property, and Armenis the Treetop and Scogna parcels. Armenis also stated in his April 4th letter:

> I suggest that myself [sic] concentrate immediately on the drafting of the final Joint Venture Agreement for our review, before it goes to the attorneys and Dr. Liebich concentrate on the Eurodollar financing. *The*

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5 Financial Futures Management Corporation. Armenis was the President of FFMC. *See* Ex. 14 at 17.

> *sooner we complete the above two projects, the less uncertainties we will have and the sooner we can start our joint venture.*

Ex. 11 (emphasis supplied).

Cramer accepted Armenis' proposal and arranged for $300,000 to be posted to cover Cramer's share of the deposits on the Orange Grove, Scogna and Treetop properties. Ex. 1, ¶ 15. Armenis was to withdraw the funds only with Cramer's express approval and only when purchase contracts on the three additional properties had been finalized. Ex. 2, ¶ 15; Ex. 1, ¶ 15.

Through April and into May 1988, Cramer and Armenis continued to negotiate the written final agreement for the development of Aquarina and the other properties, but without success. The parties never reached a final joint venture agreement. Ex. 1, ¶ 18; Ex. 3, Armenis Depo., p. 319, lines 7-19.

By July 1988, Armenis and Cramer decided to cancel the interim agreement for the Orange Grove, Scogna and Treetop properties, and to substitute a new interim agreement to purchase only the Treetop property. Ex. 1, ¶ ¶ 20 and 21; Ex. 2, ¶ ¶ 20 and 21. Both parties considered the purchase of the Treetop property a "pilot program" to test whether the final joint venture was feasible. Ex. 1, ¶ 21; Ex 2, ¶ 21. Their "test case" involved only the Treetop property. Ex. 1 ¶ 21; Ex. 2, ¶ 21; Exs. 12 and 13. Its success or failure would determine whether a joint venture agreement for the development of Aquarina and any other properties would become effective. Ex. 1, ¶ 21; Ex. 2, ¶ 21; Exs. 12 and 13.

In December 1988, an "Operating Agreement" (Ex. 14) was executed for the development of the Treetop property in the event the Treetop property was purchased. Ex. 1, ¶ 23. The agreement was between FFMC and Transnation Proper-

ties, Inc. Ex. 14. Cramer and Armenis executed the contract on behalf of their respective companies, but neither signed the document in their individual capacities. Ex. 14 at 17. Neither the Aquarina, Orange Grove, Scogna, nor unnamed 80-acre parcels were the subject of the Operating Agreement. Ex. 14.

To become effective, the Operating Agreement required the parties to purchase the Treetop property, but that purchase never took place. Ex. 1, ¶ 25; Ex. 14, ¶ 4.1, at 10. Cramer's $300,000 had not been used as a deposit on Treetop, as had been agreed. Ex. 1, ¶ 25. For this and additional reasons, Cramer demanded Armenis return Cramer's $300,000. Ex. 1, ¶ 26. Armenis refused, and in June 1989, Cramer terminated all negotiations for the final agreement. Ex. 1, ¶ ¶ 26, 27; Ex. 15. One year later, in June 1990, Cramer filed a lawsuit in state court in Brevard County, charging Armenis and several of his companies with fraud and civil theft arising from their alleged misrepresentations about the Treetop property and their failure to return Cramer's $300,000 deposit monies.

Aquarina Development, Inc. still owns Aquarina. Neither Cramer nor any company acting on his behalf ever purchased the Orange Grove. Ex. 1, ¶ 30. Accordingly to Armenis, the Orange Grove was eventually purchased by a Japanese investment group. Ex. 3, at p. 447, lines 3-7. That group was not connected with Cramer. Ex. 1, ¶ 30. The Scogna property was purchased by Aquarina Development, Inc., more than two years after the initial interim agreement was canceled and the new interim agreement was substituted, and more than one year after negotiations for a final agreement were terminated by Cramer. Ex. 1, ¶ 32. Cramer never implemented "Armenis' timeshare concept" or used Armenis' timeshare plans at Aquarina. Ex. 3, p. 406, lines 12-19; Ex. 4, p. 124, lines 1-7.

Pascall Group, Inc. was not a party to any of the negotia-

tions between Cramer and Armenis, and was not a party to the December 1988 Operating Agreement. Ex. 1, ¶ ¶ 16, 18, 23.

To summarize these events, Armenis' 1987 contact with Cramer initiated a course of negotiations consisting of three phases. In the first phase, the parties negotiated to create a joint venture to develop Aquarina, the Scogna and Orange Grove properties, and the unnamed 80 acres. These negotiations were unsuccessful; the parties never executed a final joint venture agreement. In phase two, the parties decided to at least purchase (but not develop) the Scogna and Orange Grove properties and the unnamed 80 acres while the negotiations for the final joint venture continued. This agreement to buy the additional properties, entered into in April 1988, was named the "Interim Joint Venture" by Armenis. None of these properties was ever purchased. In the third phase, the parties canceled the initial interim joint venture to purchase the three properties and replaced it with a new interim agreement to purchase only the Treetop property. This occurred in early July 1988. Later, in December 1988, a written "Operating Agreement" for the development of Treetop was executed by non-party corporations, but the agreement never went into effect.

IV. BREACH OF ALLEGED JOINT VENTURE AGREEMENT

The Plaintiffs contend that Armenis and Cramer entered into a joint venture to "build, develop, and sell a time share and hotel resort on coast properties in South Melbourne Beach, Florida." Amended Complaint (Dkt. 73), ¶ 7, at 2; *see also* Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment (Dkt. 100) at 5 (describing joint venture agreement as relating to "development of the Aquarina properties in South Melbourne Beach, Florida"). The

Plaintiffs further contend that the joint venture agreement was in writing. *Id.* at 5-6. They maintain that the following documents constitute the parties' written joint venture agreement:

1. March 3, 1988 letter from Armenis to Cramer [Liebich] (Ex. 6);

2. March 16, 1988 letter from Cramer [Liebich] to Armenis (Ex. 7);

3. March 20, 1988 letter from Armenis to Cramer [Liebich] (Ex. 8);

4. March 30, 1988 letter from Armenis to Cramer [Liebich] (Ex. 9);

5. March 31, 1988 letter from Cramer [and Liebich] to Armenis (Ex. 10);

6. July 6, 1988 internal memorandum from Cramer to Armenis (Ex. 12);

7. July 6, 1988 letter from Armenis to Cramer [Liebich] (Ex. 13);

8. July 20, 1988 letter from Cramer, Liebich and Dr. von Stechow to Armenis (Ex. 22 to Deposition of Albert Cramer); and

9. December 30, 1988 Operating Agreement (Ex. 14).

Dkt. 100 at 2 and 6-7.[6]

For limitations purposes, it is important for the Plaintiffs to succeed in their argument that these documents constitute a written agreement; unless Plaintiffs' breach of contract claim is founded on a written instrument, it is time-barred under Florida law. *See* Fla. Stat. § 95.11(2)(b) and (3)(k).

It is apparent as a matter of law from the documents upon which the Plaintiffs rely that Cramer and Armenis never reached an agreement to develop Aquarina and the adjacent properties as joint venturers. Although the parties negotiated toward that end, and they and their companies[7] reached separate agreements for smaller projects, the documents reflect beyond dispute that Cramer and Armenis were not to be bound as joint venturers on the entire development project unless and until they executed a final, written joint venture agreement. "Where the parties intend that there will be no binding contract until the negotiations are reduced to a formal writing, there is no contract until that time." *Club Eden Roc, Inc. v. Tripmasters, Inc.*, 471 So.2d 1322, 1324 (Fla. 3d DCA 1985), *review denied*, 482 So.2d 350 (Fla. 1986). The parties had not reached agreement on the essential terms of a final written joint venture contract at the time Cramer terminated their relationship. "When essential matters of a contract are left for further consideration, there is no meeting of the parties' minds and no enforceable contract." *Mid-State*

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6 At page 2 of their opposition brief, Plaintiffs identify items 1-7 and 9 as constituting the written joint venture agreement. However, at pages 6-7, they specify items 1-5 and 7-9. The Court will consider all of the documents for summary judgment purposes.

7 The Plaintiffs claim that the following issue of material fact remains unresolved: "Whether Cramer was the alter ego of the corporations and partnerships owned and controlled by him including Aquarina and Transnation." Dkt. 100 at 3. However, Plaintiffs have not presented evidence creating a jury question on this point.

Federal Sav. Bank v. Marketing and Management Associates, Inc., 570 So.2d 1016, 1018 (Fla. 5th DCA 1990), *review denied*, 581 So.2d 1309 (Fla. 1991); *see also Jacksonville Port Authority, City of Jacksonville v. W.R. Johnson Enterprises, Inc.*, 624 So.2d 313, 315 (Fla. 1st DCA 1993) ("So long as any essential matters remain open for further consideration, there is no completed contract"), *review denied*, 634 So.2d 629 (Fla. 1994); *Matter of T & B General Contracting, Inc.*, 833 F.2d 1455, 1459 (11th Cir. 1987) ("A binding and enforceable contract requires mutual assent to certain and definite contractual terms. Without a meeting of the minds on all essential terms, no enforceable contract arises" (applying Florida law)). Since the undisputed facts demonstrate that Cramer and Armenis never entered into a joint venture agreement to develop Aquarina and the adjacent properties, let alone a written agreement to do so, Cramer is entitled to summary judgment on the Plaintiffs' claim of breach of a written joint venture agreement.

V. BREACH OF FIDUCIARY DUTIES

The Plaintiffs' breach of fiduciary duties claim rests on the proposition that Cramer owed Armenis fiduciary duties as a result of their status as joint venturers on the Aquarina project. As previously stated, the undisputed evidence establishes that the two men never reached a joint venture agreement with respect to the Aquarina project as a whole. Nevertheless, Plaintiffs contend that Cramer breached fiduciary duties by means of the following alleged conduct: (1) during 1988 and 1989, secretly negotiating with third parties to purchase the Orange Grove tract, to sell the Aquarina property, and to purchase the Atlantic Marina; (2) using the joint venturers' attorneys to terminate the joint venture; (3) wrongfully terminating the joint venture agreement; (4)

on June 7, 1990, filing a civil suit against Armenis and others in state court; (5) on September 27, 1990, purchasing the Scogna property through Aquarina Development, Inc.; (6) during 1988 and 1989, obstructing and failing to support Armenis' efforts on behalf of the joint venture; and (7) appropriating Armenis' time share and hotel resort plans for use at Aquarina.

This action was commenced on June 6, 1994. Plaintiffs do not dispute that their claim of breach of fiduciary duties is subject to a four year statute of limitations. *See* Fla. Stat. 95.11(3)(p). However, Plaintiffs maintain that the acts upon which their claim is based constitute a continuing course of conduct, with the result that otherwise time-barred claims are spared the limitations axe. Plaintiffs cite no legal authority for the proposition that the discrete acts about which they complain should be treated as continuing violations for limitations purposes. The Court rejects this argument and determines that each act of alleged wrongful conduct must be examined independently for limitations purposes. Thus, even assuming that Cramer owed Armenis fiduciary duties, the acts set forth in items 1,2,3, and 6 are clearly time-barred.

Armenis has not presented any evidence to support his allegation that Cramer used Armenis' time-share and hotel resort concepts following termination of the parties' relationship (item 7). Armenis has also failed to present any legal or factual support for his contention that Cramer's filing of the lawsuit in 1990 was wrongful (item 4).

The final act of alleged misconduct is the purchase of the Scogna property by Aquarina Development, Inc. in September 1990. The Court has already determined that a joint venture with respect to the entire project never came into being. The only agreement Cramer and Armenis ever entered into that concerned the Scogna property was the initial interim agreement. As previously noted, Cramer and Arme-

nis voluntarily superseded the first interim agreement with a second interim agreement, which did not concern the Scogna tract. Aquarina Development, Inc. did not purchase the Scogna property until more than two years after the initial interim agreement was canceled.

Armenis has failed to demonstrate how the purchase of the Scogna property more than two years after the parties voluntarily terminated their only agreement concerning that parcel constitutes a breach of any fiduciary duties Cramer might have owed Armenis. Even more basically, Armenis has not demonstrated that under these circumstances Cramer owed him any fiduciary duties at all concerning the Scogna tract.[8] Finally, as previously indicated, Armenis has not demonstrated any legal or factual basis for imputing the conduct of Aquarina Development, Inc. to Cramer.

Based on the foregoing, the Court determines that Cramer is entitled to summary judgment on the Plaintiffs' claims of breach of fiduciary duties.

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8 In light of these rulings, the Court need not decide the question of whether a joint venturer's fiduciary duties to a co-venturer survive termination of the joint venture. The Court notes only that Florida law concerning the duration of fiduciary duties appears unsettled. *See Rakita v. Rose*, 547 So.2d 154, 157 n.5 (Fla. 3rd DCA 1989) (in partnership context, recognizing the existence of conflicting authority and absence of Florida authority), *review denied*, 558 So.2d 19 (Fla. 1990); *compare Grossman v. Greenberg*, 619 So.2d 406, 408 (Fla. 3rd DCA 1993) (determining that former partner's duty to notify other partners of secret profit he received did not end when he withdrew from partnership), *review denied*, 629 So.2d 133 (Fla. 1993), *with Parker v. Gordon*, 442 So.2d 273, 276 (Fla. 4th DCA 1983) (rejecting former client's breach of fiduciary duty claim against lawyer because alleged breach occurred after attorney-client relationship ended).

VI. TORTIOUS INTERFERENCE

"Under Florida law, the elements of tortious interference include: (1) the existence of an advantageous business relationship under which the plaintiff has legal rights; (2) an intentional and unjustified interference with that relationship; and (3) damage to the plaintiff." *Royal Typewriter Co., a Div. of Litton Business Systems, Inc. v. Xerographic Supplies Corp.*, 719 F.2d 1092, 1104-05 (11th Cir. 1983). Additionally, to be actionable, the interference must be direct. *Rosa v. Florida Coast Bank*, 484 So.2d 57, 58 (Fla 4th DCA 1986); *Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n*, 497 So.2d 1261, 1263 (Fla. 5th DCA 1986).

The Plaintiffs claim that Cramer tortiously interfered with their business relations with third parties, in the following respects: (1) Plaintiffs "logically presuppose" that "Cramer was going around telling people that Armenis had been making false representations as to the . . . prices [of two contracts]" (Ex. 5, ¶ 11(a), at 8); (2) Cramer filed a complaint against Armenis in state court "setting forth sham accusations of theft and fraud against Armenis" (Ex. 5, ¶ 11(b), at 8-9); and (3) Cramer took further "abusive measures", including attempts to serve Armenis with the state court complaint, and attempts "to harass Armenis, his wife, his partner and his employees by private investigators and electronic surveillance and intimidation of a key witness" (Ex. 5, ¶ 11(c), at 9).

Concerning the first item, Plaintiffs have not identified any evidence supporting their bare allegation that Cramer told third parties that Armenis had misrepresented the prices of the two contracts. In that regard, Cramer has sworn that he did not make "any false statements of any kind about Armenis or any of his companies to any third party." Ex. 1, ¶ 34. Additionally, Plaintiffs' claim of tortious interference is time-barred with respect to this act of alleged misconduct. *See*

Fla. Stat. 95.11(3)(o).

With respect to item 2, Plaintiffs have not demonstrated the falsity of any allegation in the state court complaint. Additionally, Plaintiffs have not presented any evidence that Cramer published the complaint, or any alleged false statements therein, to any third party with whom Plaintiffs had a business relationship. In that regard, Cramer has denied under oath, that he "or any of [his] agents or representatives at [his] request ever contacted representatives with the Broadwater Hotel and Resort or Dolphin Court Projects, or any other third party that was involved in a business relationship with either Armenis or Pascall Group, Inc." (Ex. 1, ¶ 35). Moreover, even if the mere filing of the complaint might be viewed as tortious, such conduct would not constitute *direct* interference. Finally, "[t]he law in Florida has long been that defamatory statements made in the course of judicial proceedings are absolutely privileged, and no cause of action for damages will lie, regardless of how false or malicious the statements may be, so long as the statements are relevant to the subject of inquiry." *Fridovich v. Fridovich*, 598 So.2d 65, 66 (Fla. 1992). "[A] plaintiff is not permitted to make an end-run around a successfully invoked defamation privilege by simply renaming the cause of action and repleading the same facts." *Id.* at 69.

Concerning the "abusive measures" alleged in Item 3, Plaintiffs have not supported these bare allegations with any facts. Even if they had, the alleged acts could not constitute *direct* interference with the Plaintiffs' business relationships with any third parties.

The foregoing analysis demonstrates that Cramer is entitled to summary judgment on the Plaintiffs' claim of tortious interference with business relationships.

VII. CONCLUSION

Based on the foregoing, it is ORDERED as follows:

1. Defendant Albert Cramer's Motion for Final Summary Judgment (Dkt. 81), filed April 25, 1996, is GRANTED.

2. The Clerk shall enter a final judgment providing that the Plaintiffs, Spiro Armenis and Pascall Group, Inc., shall take nothing on their claims against the Defendant, Albert Cramer. The final judgment shall further provide that the Defendant, Albert Cramer, shall recover his costs of action.

3. Any other pending motions are denied as moot.

4. The Clerk shall close this case.

DONE AND ORDERED in Chambers in Orlando, Florida, this 18th day of November, 1996.

/s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Appellate Case No. 97-2111
Consolidated with No. 96-3801
D.C. Case No. 94-624-CIV-ORL-22

SPYRIDON ARMENIS
Plaintiff-Appellant,

vs.

ALBERT CRAMER, et al.,
Defendant.

SUGGESTION OF REHEARING EN BANC

PLAINTIFF-APPELLANT SPYRIDON ARMENIS PRO SE

Submitted February 5, 1998.

Jurisdiction is taken from the United States District Court for the Middle District of Florida, Orlando Division. The Appeal Brief is submitted by Plaintiff-Appellant Spyridon (a/k/a "Spiro") Armenis pro se, c/o Grossmann & Partner, Kaiserstrasse 12, 60311 Frankfurt am Main, Germany, Tel.: (011-4969) 284692 or 283474.

This suggestion for en banc rehearing was prepared with the assistance of Professor Judith Resnik (Yale Law School), tel. (203) 432-1447.

STATEMENT

I believe after diligent research that the panel decision is contrary to the following precedents of this circuit and that a second en banc consideration is necessary to secure and maintain uniformity of decisions in this court:

McBride v. Sharpe, 981 F.2d 1234, 1236 (C.A. 11 Ga. 1993), *vacated on other grounds (habeas corpus considerations)* 25 F.3d 962; 29 Fed. R. Serv. 3d (Callaghan) 1200; 8 Fla. Law W. Fed. C 374 (C.A. 11 en banc)

Griffith v. Wainwright, 772 F.2d 822, 825 (C.A. 11 Fla. 1985)

Milburn v. U.S., 734 F.2d 762, 765 (C.A. 11 Fla. 1984)

STATEMENT OF THE ISSUE

1. The panel decision conflicts with the law of this circuit. The panel held (appeal decision, January 20, 1998):

> "After reviewing the record in this case, we conclude that Armenis received proper summary judgment notification ... ."

2. That decision violates the valid summary judgment notification rules set forth by this circuit in *McBride v. Sharpe*, 981 F.2d 1234, 1236 (C.A. 11 Ga. 1993), *vacated on other grounds (habeas corpus considerations)* 25 F.3d 962; 29 Fed. R. Serv. 3d (Callaghan) 1200; 8 Fla. Law W. Fed. C 374 (C.A. 11 en banc); *Griffith v. Wainwright*, 772 F.2d 822, 825 (C.A. 11 Fla. 1985); *Milburn v. U.S.*, 734 F.2d 762, 765 (C.A. 11 Fla. 1984).

It also violates the right of pro se appellant Armenis to have the panel appoint an attorney for him to argue a technically intricate procedural issue on appeal, contrary to the circuit's practice at *McBride*, 25 F.3d 962 (967).

3. The Rule of the 11th circuit R 35-3 states that an en banc consideration may be suggested to bring to the attention of the entire court a precedent-setting error of exceptional importance, and, with specific reference to a suggestion of en banc consideration upon rehearing, is intended to bring to the attention of the entire court a panel opinion that is allegedly in direct conflict with precedent of this circuit. This case, which affects local rules and involves $680,000,000 fits that rule.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

4. When defendant Cramer filed his summary judgment motion (April 25, 1996), plaintiff Armenis received no notification from the district court.

5. On May 17, 1996, the district court filed a time extension order giving Armenis until May 25, 1996 to respond to the motion for summary judgment.

6. On August 8, 1996, the district court filed a "Case Management Report," which provided the following two text blocks H and I from a standardized computer form:

> "H. A motion for summary judgment shall be accompanied by a memorandum of law, necessary affidavits, and a concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. The papers opposing a motion for summary judgment shall be in compliance with Local Rule 3.01 (b) and shall include a memorandum of law, necessary affidavits and a concise state-

ment of the material facts as to which the opposing party contends there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the opposing party's statement.

"I. The parties are notified that the Court will take motions for summary judgment under advisement 20 days from the date of filing. Until that date, the parties may file affidavits and other documents within the purview of Federal Rule of Civil Procedure 56 in support of or in opposition to the motion. However, any memorandum of law opposing the motion must be filed within ten (10) days after service of the motion, as provided in Local Rule 3.0l (b). No hearing will be held on the motion. *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984); See *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam); Fed. R. Civ. P. 56(e). These requirements apply to pro se litigants as well as parties represented by counsel."

7. The district court subsequently summarily dismissed Armenis' claims.

8. Armenis appealed to this circuit. He pointed out the foregoing facts and alleged, citing the following precedents, that the district court had failed to give him express, ten-day summary judgment notification.

9. On January 20, 1998, the appellate court panel of this circuit affirmed, holding " ... that Armenis received proper summary judgment notification ... ." The panel did not appoint an attorney for Armenis. It indicated that parts of Armenis' appeal argument were meritorious but could not be considered because they had not been presented to the district

court.[1]

ARGUMENT AND AUTHORITIES

10. This circuit requires express, ten-day summary judgment notification, *McBride v. Sharpe*, 981 F.2d 1234, 1236 (11th Cir. Ga. 1993), *vacated on other grounds (habeas corpus considerations)* 25 F.3d 962; 29 Fed. R. Serv. 3d (Callaghan) 1200; 8 Fla. Law W. Fed. C 374 (C.A. 11 en banc):

> "Before entering summary judgment against a party, ..., the district court must give that party 'express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default.' *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985)"

11. Or as set forth in *Griffith v. Wainwright*, supra:

> "[2] For the fifth time in four years this Court is forced to return to a busy district court a *pro se* case for failure to adhere to the notice requirement of Rule 56(c). We have held repeatedly that this requirement of notice will be deemed *strictissimi juris* and applies to *all* parties litigant. *Milburn v. United States*, 734 F.2d 762, 766 (11th Cir. 1984) (...)"
>
> "[3] While it is well settled in this Circuit that this requirement does not of necessity require that such notice be given at an oral hearing, *Moore*, 703 F.2d at

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1 Cf. the sentence in the appeals decision: "Moreover, we conclude that the remaining arguments presented by Armenis in this appeal were either not presented in the district court or are meritless."

519, our jurisprudence requires at least this: that an adverse party must be given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default."

12. The essence of these rules applies regardless of representation by counsel, *Milburn v. United States* (734 F.2d 762, 765 and 766 (11th Cir. Fl. 1984)):

> "[6, 7] It is well settled in this circuit that Rule 56(c) does not require an oral hearing. 'Rather, 10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court *as of a certain day* satisfies the notice and hearing dictates of Rule 56.' ... This circuit strictly enforces the 10-day notice requirement for all litigants."

15. In the instant case, the district court did not give Armenis such "express, ten-day" summary judgment notification:

a) The district court did not give express, ten-day summary judgment notification when (in its order filed May 17, 1996) it imposed an eight (8) day filing deadline (until May 25, 1996). The district court also failed to give express notice of the summary judgment rules and of consequences of a default in this order.

Nor did text blocks H and I[2] of the August 8, 1996 "Case Management Report" give express, ten-day summary judg-

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2 The text blocks do not take into account that a Motion for Summary Judgment had previously already been filed. They failed to note that the district court had ordered the non-moving plaintiff to file his defenses by May 25, 1996 (and plaintiff had filed part of a defense on May 28, 1996).

ment notification. Text block I even specified that the district court will take a motion for summary judgment under advisement 20 days from the day of its filing, and that defenses can be filed only until such time. These deadlines had lapsed months prior to this notification.

b) Citing *Jones v. American Broadcasting Cos.*, 122 F.R.D. 270, 271 (M.D.Fla. 1988), *aff'd*, 893 F.2d 1342 (11th Cir. 1989), *cert. granted, judgment vacated on other grounds*, 498 U.S. 892 (1990), defendant Cramer argued that the existence of Florida Middle District Local Rule 3.01(b)[3] is "sufficient notice to satisfy the notice requirements" of FRCP Rule 56(c).

aa) While this circuit has in earlier decision held that local rules may serve the purpose of giving notice required by Rule 56 (*Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988)), its judicature is distinct from the law of other circuits, where non-movants' Rule 56(c) interests are automatically held to be "fully protected by local rule" (e.g. *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981)).

bb) *Jones*, supra, did not rely on local rule but on an "Order of Procedure" dated April 27, 1987, wherein the court specifically notified all parties that the non-moving party would have ten (10) days to respond to the motion for summary judgment. In the instant case, no such order exists.

Thus, in distinction from *Jones*, supra, Florida Middle District Local Rule 3.01(b), in and for itself alone, is not sufficient to satisfy this circuit's precedent, and has at no time been held sufficient by this circuit.

(i) For example, Florida Middle District Local Rule

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3 Middle District of Florida Local Rule 3.01(b) provides that "[e]ach party opposing any written motion or other application shall file and serve, within ten (10) days after being served with such motion or application, a brief or legal memorandum with citation of authorities in opposition to the relief requested."

3.01(b) does not mention summary judgment rules. In *McBride*, supra (11th Cir. 1993), this circuit, in line with long-standing circuit precedent, required of a summary judgment notification that it include an express notice of summary judgment rules. This must, mutatis mutandis, also apply if the potential "notice" consists of a local rule.

(ii) Also, Florida Middle District Local Rule 3.01(b) omits mentioning the right to file "affidavits or other material." In its valid precedent, *McBride*, supra, this circuit required of a summary judgment notification that it also include express notice of the right to file "affidavits or other material." All the more so shall this requirement be upheld if the "notice" consists of an abstract local rule. It would be a mere simple step for the rule-makers to include such express notices once and for all in their local rules.

(iii) Furthermore, there is no indication of the consequences of a default in Florida Middle District Local Rule 3.01(b). This also violates the strict standard set up by this circuit and confirmed in *McBride*, supra.

16. In *McBride*, (cf. 25 F.3d 962 (967)), this circuit appointed counsel to represent the pro se appellant on appeal, presumably due to the technical intricacies of the argument. In the instant case, the panel failed to take such a precautionary measure, even though the argument is no less intricate than in *McBride*, supra (which merited an en banc rehearing once before).

CONCLUSION

The panel decision is in conflict with precedent of this circuit.

WHEREAS, Plaintiff-Appellant Armenis suggests to this Honorable Court of Appeals a Rehearing En Banc pursuant to FRAP 35, 40.

Respectfully submitted,

Date: February 5th, 1998 /s/ Spyridon Armenis

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